Supreme Court, U.S.
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No. 02-

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IN THE

Supreme Court of the United States

STEFANO PESSINA,

Petitioner,

v.

JOE S. ROSSON, ELIZABETH G. ROSSON, GHENT W. ROSSON, TODD A. ROSSON, AND TREVOR J. ROSSON, INDIVIDUALLY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, THIRD JUDICIAL DISTRICT

PETITION FOR A WRIT OF CERTIORARI

BRIAN S. GREIG*
SHERRARD L. HAYES
MARCY HOGAN GREER
REBECCA EDGAR MELTON
FULBRIGHT & JAWORSKI L.L.P.
600 Congress Avenue, Suite 2400
Austin, Texas 78701
(512) 474-5201

Counsel for Petitioner

* *Counsel of Record*

177654

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED FOR REVIEW

Should an individual whose only relevant contacts with a forum are incurred transacting business on behalf of a present and solvent corporate defendant be considered to have established minimum contacts with that forum on an individual basis, and would that exercise of jurisdiction comport with traditional notions of fair play and substantial justice?

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PETITION FOR WRIT OF CERTIORARI

Stefano Pessina files this Petition for Writ of Certiorari to review the decision of the Texas Court of Appeals, Third Judicial District, in this case.

OPINIONS BELOW

The district court's order is unpublished and was rendered in: Cause No. GN0—1419; *Joe S. Rosson, et al. v. Rx.com, Inc., et al.*, In the District Court of Travis County, Texas, 201st Judicial District. *See* App. at 15a. The opinion of the court of appeals was handed down in: Cause No. 01-00204-CV; *Stefano Pessina v. Joe S. Rosson; Elizabeth G. Rosson; Ghent W. Rosson; Todd A. Rosson; and Trevor J. Rosson, Individually*; In the Texas Court of Appeals, Third Judicial District. *See* App. at 3a. The court of appeals' opinion was published and is reported as *Pessina v. Rosson*, 77 S.W.3d 293 (Tex. App.—Austin 2001, pet. denied).

STATEMENT OF JURISDICTION

The judgment of the Texas Court of Appeals, Third Judicial District, sought to be reviewed was entered on November 15, 2001. A petition for review was filed with the Texas Supreme Court on February 4, 2002, and was denied on August 22, 2002. *See* App. at 17a. A motion for rehearing was filed with the Texas Supreme Court on September 6, 2002, and was denied on October 10, 2002. *See* App. at 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause, Section 2 of the Fourteenth Amendment to the U.S. Constitution, states:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

U.S. CONST. amend. XIV, § 2.

STATEMENT OF THE CASE

Stefano Pessina, a resident of Monaco and a citizen of Italy, is Chief Executive of Alliance Unichem PLC, a corporation of the United Kingdom with corporate offices in England. Alliance Unichem sent Mr. Pessina to Texas fewer than five times to act as its representative in negotiations with Rx.com, a now defunct Internet pharmacy that was based in Texas. The founder of Rx.com was Joe Rosson, one of the plaintiffs in this matter. At Rosson's invitation, and at the behest of Alliance Unichem, Mr. Pessina traveled to Texas solely for the purpose of representing Alliance in the negotiations with Rx.com. These business negotiations ultimately led to several agreements between Rx.com and Alliance Unichem, generally related to lines of credit and convertible notes. Mr. Pessina did not individually invest in Rx.com or otherwise participate or benefit personally from these agreements. Rather, all of the written agreements that are the subject of the underlying lawsuit were executed by Alliance Unichem, with employees other than Mr. Pessina signing on behalf of the company.

Rx.com failed as a business venture. The Rossons subsequently filed suit against Rx.com, Alliance Unichem, and several individual defendants in state district court in Travis County, Texas. Mr. Pessina contested the Texas court's personal jurisdiction over him by filing a special appearance as authorized by Texas Rule of Civil Procedure 120a, because all of the alleged contacts relevant to the specific jurisdiction alleged by the Rossons were made in his capacity as an employee of Alliance Unichem.

At the time of the special appearance, the live pleading[1] was the Plaintiffs' Third Amended Petition. The only pleading allegations concerning Mr. Pessina in that pleading pertain to Mr. Pessina's conduct on behalf of Alliance Unichem:

> Rx.com (through Joe Rosson and senior management of Rx.com) and ***Alliance (through Defendants Mills and Pessina)*** met repeatedly and negotiated the terms under which Alliance would provide financing and enter into the European Joint Venture. Ultimately, in December 1999, ***Alliance agreed*** to provide Rx.com with financing.

Third Amended Petition, ¶27 (emphasis added).[2]

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1. Also on file at the time of the hearing was an affidavit from Joe Rosson (the "Rosson Affidavit"), in which he further detailed the allegations of corporate conduct regarding Mr. Pessina, as well as set out several instances of alleged personal conduct by Mr. Pessina. These personal allegations were wholly outside of the scope of the claims alleged in the lawsuit and were thus irrelevant to the assertion of specific jurisdiction over Mr. Pessina.

2. At the special appearance hearing, the trial court questioned the fact that the live pleading (the Third Amended Petition) contained no allegations of specific conduct by Mr. Pessina. In response, counsel

(Cont'd)

Notwithstanding his lack of personal—as opposed to professional—involvement in the transaction sued upon, the trial court denied the special appearance and found personal jurisdiction over Mr. Pessina. *See* App. at 16a. Mr. Pessina filed an interlocutory appeal, but the denial of his special appearance was affirmed by the Texas Third Court of Appeals. *See* App. at 14a. The Supreme Court of Texas denied Mr. Pessina's petition for review of the appellate court's ruling, as well as his motion for rehearing of that petition. *See* App. at 18a and 2a, respectively.

REASONS FOR GRANTING THE PETITION

This case provides an appropriate vehicle to address fundamental questions of federal law concerning the constitutionality of exercising jurisdiction over employees (as opposed to their corporate employers) where the only relevant contacts of those employees with a given forum are the actions they took on behalf of, and at the behest of, their employer. This question is of vital importance both jurisprudentially and in practical terms to our national and international commerce, yet it has not been settled by this Court. *See* SUP. CT. RULE 10(c). In the absence of clear direction from this Court, tremendous variation has developed among (and even within) the states and federal jurisdictions regarding the propriety of jurisdiction over such employees. *See* SUP. CT. RULE 10(b).

(Cont'd)
for the Rossons asked for leave to amend (again), and though Mr. Pessina objected and no leave was given, filed a Fourth Amended Petition the next day. However, even this amended pleading only fleshed out the Rossons' claims as to Mr. Pessina's conduct as a representative of Alliance Unichem. It did not add claims concerning any of the allegations of personal acts from the Rosson affidavit.

I. The Exercise of Jurisdiction Over Employees Acting Only for Their Employers Violates Well-Established Principles of Due Process

In order for a state to exercise personal jurisdiction over an individual or corporation, the standard is the same. There must be minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This principle has been interpreted as a two part test: (1) whether the nonresident defendant has purposely established minimum contacts with the forum state; and (2) if so, whether the exercise of jurisdiction comports with traditional notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985).

A. The Minimum Contacts Requirement is Not Satisfied by Reliance on an Employee's Conduct on Behalf of His Employer

A critical element of this due-process, minimum-contacts analysis is that the exercise of jurisdiction be foreseeable to the defendant; in other words, "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). "[I]n each case . . . there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). These requirements "must be met as to each defendant over whom a state court exercises jurisdiction." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

These basic elements of minimum contacts are lacking where an employee goes into a forum state to transact business on behalf of his employer, as the contacts are not truly those of the employee, but rather are those of his employer. Because none of the employee defendant's acts in such circumstances are personal acts, they do not amount to the purposeful transaction of business by the defendant as an individual.

Here, just as is the case with most employees conducting negotiations for a corporation, Mr. Pessina never contracted as an individual with a resident of Texas for the performance of a contract in Texas. The agreements at issue were negotiated by Mr. Pessina solely for Alliance Unichem, in his capacity as a corporate representative of Alliance Unichem. Mr. Pessina had no direct beneficial interest in any of the agreements and no personal cause of action in the event of a breach. Mr. Pessina's relationship with, and actions on behalf of, Alliance Unichem were never disguised or misrepresented.

B. Basing Jurisdiction on an Employee's Corporate Conduct Does Not Comport With Traditional Notions of Fair Play and Substantial Justice

Once it is determined that a defendant has purposefully established minimum contacts within the forum state, these contacts must then be considered in light of all other facts to determine whether assertion of personal jurisdiction comports with the due process standard of "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 320. Determinative factors include the following: (1) the burden on the defendant, (2) the interests of the forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and

effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states. *Asahi Metal Indus. Co., Ltd. v. Superior Court of Calif.*, 480 U.S. 102, 113 (1987) (citing *World-Wide Volkswagen*, 444 U.S. at 292).

An analysis of the five factors demonstrates the unfairness of exercising personal jurisdiction here. The burden on Mr. Pessina (and any employee in his situation) is severe. The "unique burdens placed upon one," like Mr. Pessina, "who must defend oneself in a foreign legal system," were noted by this Court in *Asahi*. 480 U.S. at 114. Such considerations "should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* In evaluating the state's interest in adjudicating the dispute, it must be recognized that without imposing the burden of jurisdiction on the individual employee, the dispute can ***still*** be adjudicated—but against a corporate defendant much more equipped to fund and manage the defense of a lawsuit in a faraway and inconvenient forum. More to the point, the dispute will be litigated against the party that did purposefully avail itself of the privilege of doing business in Texas—Alliance Unichem.

The remaining three factors—the plaintiff's interest in obtaining relief, the interests of the interstate judicial system and interests of the several states (or as is the case here, those of other ***nations***)[3]—are similarly influenced by the impact

3. *See Asahi*, 480 U.S. at 115 (indicating that in cases where the defendant is a resident of another nation, "this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction. . . .") (emphasis in original).

of the presence of a solvent corporate defendant. Declining to exercise jurisdiction under such circumstances will not in any way deny the plaintiff full relief. Moreover, the impact of the fact that jurisdiction over a foreign national is at issue cannot be understated. As this Court stated in *Asahi*:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "***Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.***"

480 U.S. at 115 (emphasis added). Such concerns are only compounded when the alien defendant at issue is an individual whose presence in the suit wholly duplicates that of his employer. When full satisfaction of any judgment can be had by suit against the corporation alone, and there are no claims alleged that are particular to the individual employee at issue (all causes of action are alleged against the corporation as well), there is simply no reason to impose the burden of jurisdiction on the individual employee.

II. This Case Squarely Presents the Broader Question Regarding Jurisdiction Over Employees as Individuals Left Open by the Court

A. The Court Should Further Define the Circumstances Under Which an Employee May Reasonably Expect to be Haled Into Court on an Individual Basis

Courts across the country, searching for guidance on this question, have turned to this Court's opinion in *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, this Court's analysis turned upon the ultimate inquiry in any personal jurisdiction case: whether the defendant should have reasonably anticipated being haled into court in the forum state. 465 U.S. at 789-90. The defendants in *Calder*—who were professional journalists with the *National Enquirer*, a publication of nationwide circulation having a notable distribution network in California—published an allegedly defamatory article on California actress Shirley Jones. *Id.* at 784. When Ms. Jones sued them in a California court, the journalists claimed that the court lacked jurisdiction over their persons since they were merely a reporter and editor, respectively, for the paper. *Id.* at 789. In doing so, the journalists "liken[ed] themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California." *Id.* This Court's rejection of the defendants' attempted analogy illustrates its reasoning:

> [The journalists'] analogy does not wash. Whatever the status of their hypothetical welder, [the journalists] are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and

> petitioner Calder edited an article that they knew would have a potentially devastating impact upon [Ms. Jones]. And they knew that the brunt of that injury would be felt by [Ms. Jones] in the State in which she lives and works and in which the National Enquirer has its largest circulation. ***Under the circumstances, [the journalists] must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article."***

465 U.S. 789-90 (quoting *World-Wide Volkswagen*, 444 U.S. at 297) (emphasis added). It did not escape the Court's notice that the reporter's personal "byline" appeared on the published article, *id.* at 785, and thus the specific journalistic piece at issue stood to benefit him personally.

With regard to the effect of the individual defendants' status as employees, this Court noted only that it did not "somehow insulate them from jurisdiction" and re-emphasized the fact that "[e]ach defendant's contacts with the forum state must be assessed individually." 465 U.S. at 790 (citations omitted). Far from announcing a *per se* rule that employees should be subjected to individual jurisdiction for contacts arising out of performing their job for a corporation, *Calder* supports the unremarkable proposition that employee actions also possessing an individual (as opposed to purely corporate) character or benefit will not be ignored merely because they are by an employee. When the actions or contacts at issue possess such a personal nature or benefit (even if they also benefit the corporation, as was the case in *Calder*), the exercise of personal jurisdiction is both appropriate and constitutionally permissible. In the instant case, by contrast, Mr. Pessina

did not reasonably expect that he would benefit personally (nor, in fact, did he) from the transactions that are the subject of the suit, or that he would be individually "haled into court" in Texas to answer for claims made against his corporation. There is no benefit in this case (or in most corporate fact scenarios) analogous to the personal byline in *Calder*.

B. This Important Jurisdictional Question Has Been Answered Differently by Various Courts

Whether individual jurisdiction exists over employees for acts taken in their capacity as corporate employees has been the subject of many years of debate in the courts of this country, much of it within the context of a concept referred to as the "fiduciary shield doctrine." *See, e.g., Stuart v. Spademan*, 772 F.2d 1185, 1197-98 (5th Cir. 1985); *Saktides v. Cooper*, 742 F. Supp. 382, 385 (W.D. Tex. 1990) (collecting cases). Properly regarded, the fiduciary shield doctrine is nothing more than a rearticulation of basic principles of due process (see section I, above)[4] and a recognition of the jurisdictional implications of the law of corporations. Corporations can only act through individuals, so the fiduciary shield doctrine seeks to attribute contacts to the party they belong to: when an individual acts solely on behalf

4. Some courts have viewed the fiduciary shield doctrine as part of the analysis to be applied by courts in interpreting state long-arm statutes (rather than as part of the constitutional due process analysis). *See, e.g., Marine Midland Bank v. Miller*, 664 F.2d 899 (2d Cir. 1981) (New York long-arm statute did not extend to the full limits of due process). This is only possible where the state long-arm statute does not extend jurisdiction to the full limits authorized by the Constitution. The Texas long-arm statute has been recognized as extending to the limits of due process. *See, e.g., CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996); *Shapolsky v. Brewton*, 56 S.W.3d 120, 129 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

of a corporation, his acts and any resulting contacts belong to the corporation, as it is the corporation alone that has benefited from the forum contact.

Two well-established "exceptions" to the fiduciary shield doctrine exist, although in fact they are not really exceptions at all, but just extensions of the idea that if the contacts are not purely corporate, they belong to the individual. These are the personal benefit exception and the alter ego exception. Obviously, where an individual acts to benefit himself rather than his corporation, he is incurring individual contacts with a forum that should not be imputed to his corporation in the jurisdictional analysis. Similarly, when the corporation at issue is nothing but a sham or an alter ego of the individual involved, the contacts belong to the individual rather than the corporation.

A third and perhaps less common exception, the "tort exception," was applied by the Texas Court of Appeals in this case. This exception attributes employee actions that are conducted on behalf of the employer, and allegedly result in a tort, to the employee for jurisdictional purposes.[5] This idea of excepting conduct relating to alleged torts from the protection of the fiduciary shield doctrine makes conceptual sense; but as applied it proves to swallow the rule because of the realities of modern business

5. This is the exception most generally relied upon to distinguish this Court's holding in *Calder* by those courts still attempting to apply the fiduciary shield doctrine. Yet given the unusual facts of *Calder* (the intentional tort at issue was libel, unlikely to arise in a garden variety business dispute), it is easy to see how the law in this area has become distorted; the widespread application of the *Calder* holding to such factually distinct scenarios (such as the business negotiations at issue in this case) further emphasizes the need for this Court to more completely address this issue than was possible in *Calder*.

litigation. Unfortunately, nearly every business dispute today involves allegations of "business torts," like fraud and misrepresentation, and many litigants join as parties the individual employees who simply negotiated the transaction in what would formerly have been a simple breach of contract lawsuit against a corporate defendant only.

A number of state and federal courts have recognized some form of the fiduciary shield doctrine[6] (with varying treatments of the exceptions outlined above), whether by that name or not. *See, e.g., Stuart v. Spademan*, 772 F.2d at 1197-98; *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981); *Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1065 (4th Cir. 1983); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1281 (10th Cir. 1969); *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1426 (D. Nev. 1994); *Violanti v. Emery Worldwide*, 847 F. Supp. 1251, 1256 (M.D. Penn. 1994); *McClelland v. Watling Ladder Co.*, 729 F. Supp. 1316, 1320 (W.D. Okla. 1990); *Saktides*, 742 F. Supp. at 385; *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 384 (D.N.M. 1984); *Stuart v. Federal Energy Sys., Inc.*, 596 F. Supp. 458, 461 (D. Vt. 1984); *Idaho Potato Comm'n v. Washington Potato Comm'n*, 410 F. Supp. 171, 182 (D. Idaho 1975); *Flocco v. State Farm Mut. Auto. Ins.* Co., 752 A.2d 147, 163 (D.C. 2000); *Doe v. Thompson*, 620 So. 2d 1004, 1006 (Fla. 1993); *Rollins v. Ellwood*, 565 N.E.2d 1302, 1318 (Ill. 1990); *Christian Book Distributors, Inc. v. Great Christian Books, Inc.*, 768 A.2d 719, 733-34 (Md. Ct. Spec. App. 2001); *Brown v. General Brick Sales Co.*, 39 S.W.3d 291, 300 (Tex. App.—Ft. Worth 2001, no pet.).

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6. It should be noted that some of these authorities do so in the context of interpreting the language of the state long-arm statute, and not in the broader context of due process analysis.

An equal or greater number of courts have rejected the concept, instead subjecting employees to individual jurisdiction even though their only contacts with the forum are on behalf of their corporate employers. *See, e.g., Davis v. Metro Productions, Inc.*, 885 F.2d 515, 521 (9th Cir. 1989); *Torchmark Corp. v. Rice*, 945 F. Supp. 172, 176 (E.D. Ark. 1996); *Springs Indus., Inc. v. Gasson*, 923 F. Supp. 823, 826 (D. S.C. 1996); *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 844 (E.D. Mich. 1994); *Mobil Oil Corp. v. Advanced Envtl. Recycling Techns., Inc.*, 833 F. Supp. 437, 442-43 (D. Del. 1993); *Seiber v. Campbell*, 810 So. 2d 641, 645 (Ala. 2001); *see also Sudduth v. Howard*, 646 So. 2d 664, 668 (Ala. 1994); *Taylor-Rush v. Multitech Corp.*, 265 Cal. Rptr. 672, 681 (Cal. Ct. App. 1990); *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 492 (Kan. 1991); *Principal Mutual Life Ins. Co. v. Glick*, 1994 WL 878819, at *3 (Mass. Super. Ct. Dec. 14, 1994); *Holste v. Burlington Northern R.R.*, 592 N.W.2d 894, 909 (Neb. 1999); *Estabrook v. Wetmore*, 529 A.2d 956, 957 (N.H. 1987); *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 47 (N.Y. 1988).

Still other jurisdictions are internally conflicted on the question. *See, e.g., Intermatic Inc. v. Taymac Corp.*, 815 F. Supp. 290, 296 (S.D. Ind. 1993); *but see Ryan v. Chayes Virginia, Inc.*, 553 N.E.2d 1237, 1240 (Ind. Ct. App. 1990); *Aquadrill, Inc. v. Environmental Compliance Consulting Servs., Inc.*, 558 N.W.2d 391, 394 (Iowa 1997); *Whalen v. Connelly*, 545 N.W.2d 284, 295 (Iowa 1996); *State ex rel. Miller v. Baxter Chrysler Plymouth, Inc.*, 456 N.W.2d 371, 378 (Iowa 1990); *but see State ex rel. Miller v. Moneda Corp.*, 1997 Iowa Sup. LEXIS 343, at * 4-5 (Iowa 1997); *Fryar v. Westside Habilitation Ctr.*, 479 So. 2d 883, 890 (La. 1985); *Escoto v. U. S. Lending Corp.*, 675 So. 2d 741, 746 (La. Ct. App. 1996); *but see Office Dimensions—*

Louisiana, Inc. v. King, 718 So. 2d 1052, 1056 (La. Ct. App. 1998); *Oakridge Holdings, Inc. v. Brukman*, 528 N.W.2d 274, 278 (Minn. Ct. App. 1995); *Cantrell v. Extradition Corp. of Am.*, 789 F. Supp. 306, 310 (W.D. Mo. 1992).

C. The Court Should Use This Opportunity to Provide Clarity for Foreign Corporate Employees

The fiduciary shield doctrine has never been reached by this Court, and the jurisprudential void has led to conflicting decisions nationwide, giving rise to much uncertainty in the national and international business community. Foreign employees never quite know whether they are subjecting themselves to the jurisdiction of a given forum simply by conducting their employer's business there. In Arkansas they are, while in Pennsylvania they are not. Allowing a court to assert jurisdiction over a non-resident defendant whose only contact with the state is the conduct of business on behalf of a corporation is contrary to due process, and the failure of U.S. courts to uniformly recognize this fact unquestionably puts a damper on the transaction of international business in this country.[7] This is particularly the case where (as here) the proper defendant, the corporation, has not contested jurisdiction and is solvent and able to pay a judgment that may be obtained in the litigation. If employees are individually required to defend the acts of their employer, what is the function of the corporate form? Such a result is unquestionably unfair and contrary to both the Constitution and the fundamental purpose of a corporation, and should not stand.

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7. *Cf.* Sonal N. Mehta, *Pavlovich v. Super. Ct. of Santa Clara Cty.*, 17 Berkeley Tech. L.J. 337, 355 (noting in Internet context that increasingly expansive and overbroad definitions of "minimum contacts" and "purposeful direction" will have a "chilling effect" on commerce).

CONCLUSION

For the reasons stated above, Stefano Pessina's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BRIAN S. GREIG*
SHERRARD L. HAYES
MARCY HOGAN GREER
REBECCA EDGAR MELTON
FULBRIGHT & JAWORSKI L.L.P.
600 Congress Avenue, Suite 2400
Austin, Texas 78701
(512) 474-5201

Counsel for Petitioner

* *Counsel of Record*

APPENDIX A — LETTER FROM THE SUPREME COURT OF TEXAS TO BRIAN S. GREIG, ESQ. AND THOMAS W. PIRTLE, ESQ. DENYING THE MOTION FOR REHEARING DATED OCTOBER 10, 2002, RECEIVED OCTOBER 14, 2002

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

October 10, 2002

Mr. Brian S. Greig
Fulbright & Jaworski
600 Congress Ave., Ste. 2400
Austin, TX 78701

Mr. Thomas W. Pirtle
O'Quinn Laminack & Pirtle
440 Louisiana, Suite 2300
Houston, TX 77002

RE: Case Number 02-0107
Court of Appeals Number: 03-01-00204-CV
Trial Court Number: GN0-01419

Style: STEFANO PESSINA
v.
JOE S. ROSSON, ELIZABETH G. ROSSON, GHENT W. ROSSON, TODD A. ROSSON, AND TREVOR J. ROSSON, INDIVIDUALLY

Appendix A

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review. Justice Rodriguez was not sitting.

Sincerely,

Andrew Weber, Clerk

by s/ Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

APPENDIX B — OPINION OF THE THIRD DISTRICT COURT OF APPEALS OF TEXAS DATED NOVEMBER 15, 2001

COURT OF APPEALS OF TEXAS,
AUSTIN.

No. 03-01-00204-CV.

Stefano PESSINA,

Appellant,

v.

Joe S. ROSSON; Elizabeth G. Rosson; Ghent W. Rosson; Todd A. Rosson; and Trevor J. Rosson, Individually,

Appellees.

Nov. 15, 2001.
Rehearing Overruled Dec. 20, 2001.

Before Chief Justice *ABOUSSIE*, Justices *B.A. SMITH* and *PURYEAR*.

MARILYN ABOUSSIE, Chief Justice.

Appellant Stefano Pessina brings this appeal from the district court's denial of his special appearance. Pessina contends the district court erred by (1) denying his special appearance, (2) holding Texas has specific jurisdiction over him, (3) determining that the exercise of personal jurisdiction would not offend traditional notions of fair play and

substantial justice, and (4) failing to hold that the fiduciary shield doctrine applied to Pessina's acts.[1] We will affirm the district court's order.

BACKGROUND

Pessina, a resident of Monaco and citizen of Italy, represented Alliance Unichem ("Alliance"), an English corporation, in investment negotiations with Rx.com, an Austin corporation formerly owned and controlled by the Rossons. Pessina traveled to Texas five times within a span of two years to meet with Joe Rosson concerning business dealings between Alliance and Rx.com. Rosson alleges that, as a result of those meetings and certain assurances made by Pessina, Rosson entered into a course of dealings ultimately culminating in Rx.com's insolvency. Alliance assumed ownership of Rx.com as a result of its creditor status with the company. The Rossons initially brought suit against Alliance and other corporate defendants and later amended their pleadings to include Pessina individually. Pessina filed a special appearance, which the district court denied. Pessina now brings this interlocutory appeal.

---

1. Pessina presents his argument that the district court erred by failing to apply the fiduciary shield doctrine in two parts. The first of these is framed as requiring a purely legal determination: "Did the district court err in holding that the fiduciary shield doctrine does not apply to an individual whose only acts within Texas, performed solely as a corporate representative, establish personal jurisdiction over the corporate representative individually?" Because we find no place in the record in which the district court made such a holding, and because both the district court's letter order and formal order address the facts of this case specifically, we limit our discussion of the fiduciary shield doctrine to the facts of this case. *See* Tex.R.App. P. 38.1(h).

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DISCUSSION

Specific Jurisdiction

In his first two issues, Pessina argues the district court erred by denying his special appearance and by holding Texas has personal jurisdiction over him. Generally, the standard of review for a district court's denial of a special appearance is a factual sufficiency review. *See, e.g., Minucci v. Sogevalor*, 14 S.W.3d 790, 794 (Tex.App.—Houston [1st Dist.] 2000, no pet.); *Cadle v. Graubart*, 990 S.W.2d 469, 470 (Tex.App. — Beaumont 1999, no pet.). However, "[w]here . . . the special appearance is based on undisputed or otherwise established facts, an appellate court should conduct a de novo review of the trial court's order." *Brown v. Gen. Brick Sales Co., Inc.*, 39 S.W.3d 291, 294 (Tex.App.—Fort Worth 2001, no pet. h.); *see also Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 715 (Tex.App.- Austin 2000, pet. dism'd w.o.j.). In his reply brief and at oral argument, Pessina contends the facts underlying the jurisdictional inquiry are undisputed:

> A concession made by the Rossons' counsel at the hearing below removed the only factual controversy from the personal jurisdiction calculus, leaving for the decision the application of controlling law to the undisputed facts. Specifically, the Rossons' attorney told the district court it did not have to resolve any factual conflict as to whether Mr. Pessina stood to benefit personally from any of the activity that the Rossons claim forms the basis of personal jurisdiction.

Appendix B

To support his argument that there are no disputed facts, Pessina points to the following statement made by the Rossons' attorney during the special appearance hearing:

> I think we're going to have a real argument about the personal gain of Mr. Pessina versus Mr. Rosson, about whether they were trying to make a personal profit separate and apart from the corporation. We're not going to agree on that, but that's irrelevant.

We do not agree with Pessina that this statement by the Rossons' attorney renders this dispute purely legal; a factual dispute still exists as to whether Mr. Pessina acted in a personal or representative capacity during some of his negotiations with Mr. Rosson. Therefore, we will review the district court's denial of his special appearance under a factual sufficiency review. *See Cadle*, 990 S.W.2d at 471.

We note that the Rossons do not have the burden to establish facts to support the exercise of jurisdiction over Pessina; it is Pessina who has the burden of negating all bases of jurisdiction. *See id.* To prevail in a special appearance, a nonresident must negate all bases of personal jurisdiction. *Id.* at 470. When a trial court overrules a special appearance, the defendant should request findings of fact under Texas Rule of Civil Procedure 296. *Daimler-Benz*, 21 S.W.3d at 715. Because the trial court made no findings in this case, we must imply all facts necessary to support the ruling. *Id.*

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A Texas court may exercise jurisdiction over a nonresident defendant if the Texas long-arm statute authorizes the exercise of jurisdiction and the exercise of jurisdiction comports with due process. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex.1991); *see also* Tex. Civ. Prac. & Rem.Code Ann. § 17.042 (West 1997 & Supp.2001). The broad language of the long-arm statute permits an expansive reach, limited only by the federal constitutional requirements of due process. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex.1990). As a result, we consider only whether it is consistent with federal due process for the Texas courts to assert personal jurisdiction over Pessina. *See Daimler-Benz*, 21 S.W.3d at 714.

The federal due process clause protects a nonresident's liberty interest in not being subject to the jurisdiction of a forum with which that nonresident has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Under the federal due process clause, a state may assert personal jurisdiction over a nonresident defendant only if the defendant has purposefully established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Id.* at 476, 105 S.Ct. 2174. The touchstone of minimum contacts is whether the nonresident defendant has purposefully availed itself of the privilege of conducting activities in Texas so that it is reasonable for the nonresident defendant to expect the call of a Texas court. *Daimler-Benz*, 21 S.W.3d at 714.

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The minimum contacts analysis has been refined into two types of jurisdiction—general and specific. *Id.* The parties stipulate that general jurisdiction is not at issue, and that this appeal is limited to whether Texas has specific jurisdiction over Pessina. Specific jurisdiction exists when the cause of action arises out of or relates to the nonresident's contacts with the forum state. *Id.* The defendant's activities must have been purposefully directed toward the forum state. *Id.* Under specific jurisdiction, the minimum contacts analysis focuses on the relationship among the defendant, the forum, and the litigation. *Id.* (citing *Guardian Royal*, 815 S.W.2d at 228).

In their fourth amended petition, the Rossons allege that Pessina caused and exploited Rx.com's financial crisis and oppressed its shareholders:

> 44. Pessina encouraged Rx.com to privately place Rx.com equity needed to fund its operations. Pessina further demanded, as a condition to the Security Purchase Agreement for the purchase of the Convertible Note, that Rx.com accelerate its expansion and marketing plans. Pessina explained that he would be able to obtain additional capital for Rx.com before Rx.com spent its present cash in the accelerated development efforts. Based upon Pessina's representations and requests, Rx.com agreed to accelerate the development plans of Rx.com. This accelerated development led directly to the cash crisis at Rx.com which Alliance Pessina [sic] exploited to steal Rx.com's

> technology and the value of the Plaintiff's stock at Rx.com. The meeting between Plaintiff Rosson and Rx.com was held in the offices of Rx.com in Austin, Texas.
>
> 45. Mr. Pessina traveled to Austin in April 2000 to negotiate the term sheet under which Plaintiffs agreed to resign their management positions at Rx.com. Indeed, Mr. Pessina was the individual who insisted that Plaintiffs leave their management positions. This exit became the vehicle which Alliance and Pessina used to oppress the Plaintiffs' interest as shareholders.

These pleadings sufficiently allege that Pessina is subject to specific jurisdiction in Texas. Tex.R. Civ. P. 45(d); Tex. Civ. Prac. & Rem.Code Ann § 17.042(2) (West 1997) ("[A] nonresident does business in this state if the nonresident commits a tort in whole or in part in this state."). In support of these allegations, the Rossons offered the affidavit of Mr. Rosson, which stated that Pessina acted in his personal capacity by negotiating for a personal interest in a future business venture and offering to invest personal funds to facilitate the Rossons' withdrawal from Rx.com:

> 8. Moreover, Mr. Pessina did not act merely in his capacity as an officer of Alliance, he acted in his personal capacity as well. In December 1999, Mr. Pessina requested that I agree to restructure the pan-European Joint venture to include a personal interest for Mr. Pessina and for myself.

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> In addition, in April 2000, during the negotiation of the term sheet in Austin, Texas, Mr. Pessina offered to invest his personal funds in another business venture of mine as compensation for the value of my and the other Plaintiffs' Rx.com stock if it would facilitate my and the other Plaintiffs' withdrawal from our management positions at Rx.com.

Based on the Rossons' pleadings and affidavit, there is sufficient evidence to support the conclusion that Pessina is subject to specific jurisdiction in Texas. *See* Tex.R. Civ. P. 120a(3). Accordingly, the district court did not err in denying Pessina's special appearance, and we overrule his first and second issues.

Traditional Notions of Fair Play and Substantial Justice

In his third issue, Pessina argues that the trial court erred by determining that the exercise of personal jurisdiction over him comports with traditional notions of fair play and substantial justice. After a court finds the minimum contacts necessary to exercise personal jurisdiction over a nonresident defendant, federal due process requires a determination of whether the exercise of that jurisdiction comports with traditional notions of fair play and substantial justice. *Guardian Royal*, 815 S.W.2d at 228. In deciding this issue, we consider the following factors: (1) the burden on the defendant, (2) the interests of the forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest

in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Daimler-Benz*, 21 S.W.3d at 725. "When the defendant is a resident of another nation, the court must also consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a state court as well as the federal government's interest in its foreign relations policies." *Id.* at 725-26.

Another court of appeals has observed that "[o]nly in rare cases will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." *Minucci*, 14 S.W.3d at 798-99. Accordingly, it is necessary that Pessina "present a compelling case that the presence of some consideration would render the assertion of jurisdiction unreasonable." *Id.* at 798. Pessina emphasizes that he resides in Monaco and is a citizen of Italy, has neither a business office nor residence in Texas, has no registered agent for service in Texas, owns no real estate and pays no taxes in Texas, has never been licensed to do business in Texas, does not maintain any bank accounts in Texas, and does not conduct any business in Texas. The basis of his last claim, of course, is that he has never conducted business in Texas in a *personal* capacity and therefore has not purposefully availed himself of the benefits and protections of the laws of Texas.

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Pessina cites two cases holding that, although a non-resident defendant had minimum contacts, the exercise of personal jurisdiction would not comport with notions of fair play and substantial justice. *See Guardian Royal*, 815 S.W.2d at 233; *Minucci*, 14 S.W.3d at 799. *Guardian Royal* involved a dispute between two insurers, neither of which was a Texas consumer or insured; accordingly, the court held "Texas' interest in adjudicating the dispute is considerably diminished." *Guardian Royal*, 815 S.W.2d at 233. Similarly, the First Court of Appeals explained why the exercise of personal jurisdiction over Minucci, an Italian citizen, did not comport with notions of fair play and substantial justice:

> Texas has no interest in adjudicating this dispute. The cause of action did not occur in Texas; neither party is a resident of this state; Swiss law governs the dispute, none of the investors were Texas citizens, and the contract was written in Italian. Thus, Texas would not be protecting its citizens from the potential future actions of Minucci.

Minucci, 14 S.W.3d at 798.

In the case at bar, however, Texas' interest in adjudicating the dispute is significant: Rx.com is a Texas corporation; the Rossons are residents of Texas; Pessina's alleged tortious acts occurred in Texas; and whether Pessina is liable will be determined according to Texas law. In this case, "the interests of the forum state and the plaintiff will justify the severe burden placed upon the nonresident defendant." *Guardian Royal*, 815 S.W.2d at 232. Furthermore, Pessina does not

contend that the procedural and substantive policies of other nations or the federal government's foreign relations policies will be affected by the exercise of personal jurisdiction over him. Therefore, we overrule Pessina's third issue.

The Fiduciary Shield Doctrine

In his final issue, Pessina argues the district court erred in failing to apply the fiduciary shield doctrine to his acts, rendering him individually amenable to suit in Texas. The fiduciary shield doctrine is a theory of liability that has been applied in a jurisdictional context. *See Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 437-38 (Tex.1982) (speaking in terms of "alter ego"). The doctrine shields a nonresident defendant from suit in a forum state when his or her only contacts with that state are in a representative capacity. *See Cadle*, 990 S.W.2d at 473. The parties agree that this doctrine has been used to shield a nonresident defendant from suit based on general jurisdiction, but there is some disagreement about whether it applies in a specific jurisdiction context.

The Rossons' pleadings specifically allege that Pessina caused and exploited Rx.com's financial crisis and oppressed its shareholders. In addition, Mr. Rosson's affidavit asserts that Pessina acted in his personal capacity by negotiating for a personal interest in a future business venture and offering to invest personal funds to facilitate the Rossons' withdrawal from Rx.com. This case is therefore distinguishable from two of the main cases Pessina relies upon for the contention that he is protected from personal jurisdiction by the fiduciary shield doctrine. *See Siskind*, 642 S.W.2d at 437-38

(emphasizing that plaintiff's petition did not attribute specific acts of conspiracy or misrepresentations to individual respondents); *Cadle*, 990 S.W.2d at 473 (noting that plaintiff's "allegations and evidence relevant to the tortious conduct are non-specific" and that the only evidence presented by plaintiff in support of his argument that the court should have personal jurisdiction over defendant is that he "was the president, sole shareholder, and sole director" of defendant company); *see also Calder v. Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) ("Petitioners are correct that their contacts with [the forum state] are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction.").

Because the Rossons attribute tortious conduct to Pessina individually as well as in his representative capacity, the district court did not err in failing to apply the fiduciary shield doctrine. Accordingly, we overrule Pessina's final issue.

CONCLUSION

We overrule all of Pessina's complaints on appeal. We therefore affirm the judgment of the district court.

APPENDIX C — ORDER OF THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS DATED APRIL 11, 2001

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

201st JUDICIAL DISTRICT

CAUSE NO. GN0-01419

JOE S. ROSSON, et al.,

Plaintiffs,

V.

RX.COM, INC., et al.,

Defendants.

ORDER DENYING DEFENDANT STEFANO PESSINA'S SPECIAL APPEARANCE AND VACATING ERRONEOUS ORDER

On March 8, 2001, the Court held a hearing regarding Defendant Stefano Pessina's Special Appearance. Mr. Pessina and the Plaintiffs appeared by and through their counsel of record, and presented argument and evidence to the Court. Based upon the argument and evidence presented by counsel, the Court concluded that the special appearance should be denied. On March 26, 2001, however, the Court, intending to enter an order denying Mr. Pessina's special appearance, inadvertently signed an order (a copy of which is attached as Exhibit A) purporting to grant Mr. Pessina's special appearance.

Appendix C

Accordingly, the Court hereby VACATES its order of March 26, 2001 (a copy of which is attached as Exhibit A); and

ORDERS, ADJUDGES, and DECREES that Defendant Stefano Pessina's Special Appearance is DENIED.

Signed, April 11, 2001.

s/ Pete Lowry
PRESIDING JUDGE

APPENDIX D — LETTER FROM THE SUPREME COURT OF TEXAS TO BRIAN S. GREIG, ESQ. AND THOMAS W. PIRTLE, ESQ. DENYING PETITION FOR REVIEW DATED AUGUST 22, 2002

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

August 22, 2002

Mr. Brian S. Greig
Fulbright & Jaworski
600 Congress Ave., Ste. 2400
Austin, TX 78701

Mr. Thomas W. Pirtle
O'Quinn Laminack & Pirtle
440 Louisiana, Suite 2300
Houston, TX 77002

RE: Case Number 02-0107
Court of Appeals Number: 03-01-00204-CV
Trial Court Number: GN0-01419

Style: STEFANO PESSINA
v.
JOE S. ROSSON, ELIZABETH G. ROSSON, GHENT W. ROSSON, TODD A. ROSSON, AND TREVOR J. ROSSON, INDIVIDUALLY

Appendix D

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. (Justice Rodriguez not sitting.)

Sincerely,

Andrew Weber, Clerk

by s/ Jessica L. Vlasac
Jessica L. Vlasac, Deputy

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza